Filed 6/28/19 Ouyang v. Achem Industry America, Inc. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| LIN OUYANG,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ACHEM INDUSTRY AMERICA, INC.,<br><br>Defendant and Respondent. | B261929<br><br>(Los Angeles County Super. Ct. No. BC468795) |

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, Michael B. Harwin, Judge. Affirmed.

Lin Ouyang, in pro. per., for Plaintiff and Appellant.

Law Offices of Ray Hsu, Ray Hsu and Minh Phan, for Defendant and Respondent.

## INTRODUCTION

Plaintiff and appellant Lin Ouyang sued her former employer, defendant and respondent Achem Industry America, Inc. (Achem), on multiple legal theories, including allegations that respondent reneged on a promise to pay her $32 per hour, failed to pay overtime compensation, and did not permit her to take rest breaks. A jury returned a unanimous verdict in respondent's favor.

Appellant raises a host of issues, but most are forfeited due to her failure to comply with the requisites of appellate procedure. Her remaining contentions have no merit, and we affirm the judgment and the postjudgment order awarding respondent its expert witness fees (Code Civ. Proc., § 998, subd. (c)(1))[1].

## FACTUAL AND PROCEDURAL BACKGROUND

Neither party submitted briefs that include a traditional statement of facts. Accordingly, we summarize the evidence "'in the light most favorable to the judgment.'" (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 286 (*Bigler-Engler*).)

Appellant earned a bachelor's degree in electrical engineering from a university in China and a master's degree in computer science from the University of Southern California. In approximately 2004, after being laid off from her computer programming job, appellant asked her first cousin, Jowlin (Joe) Tang, for employment. Tang was then the general manager of Achem, a manufacturing and retail business. Tang helped appellant obtain a temporary H-1B work visa, and she embarked on a career with respondent.

In 2005, Tang became chairman of Achem's parent company and moved his base of business operations to the home office in Taiwan. About that time, appellant approached Tang with a request that Achem sponsor her application for a green card.[2] Because he was her cousin, Tang agreed: "I

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[1] All undesignated statutory references are to the Code of Civil Procedure.

[2] "Green card" is the everyday term for an alien registration card, "a photo identification document [that] establish[es] both identity and

had told her back then that you can use the e-mail of Achem on your application to apply [in the] name of Achem, but the other details like finding a lawyer and all the other stuff you have to manage that on your own, you have to do it yourself." Tang considered his approval for appellant "to use the name of [Achem] on [her] application . . . a big favor."

Appellant hired an immigration attorney and set up Achem's online account on the government website for the electronic processing of the sponsor's petition in support of an alien employee's green card application. The petition, "ETA form 9089," required a description of the job opportunity offered by the employer, prevailing wage information for the position, and the wage the employer was actually offering. Appellant and her attorney described the job title as "Computer & Information System Manager," with a wage offer from Achem of $32 per hour. Based on the job description, the ETA form 9089 also required proof that the job listing was advertised in a newspaper of general circulation. Appellant created a job listing and paid for it to be advertised in the Los Angeles Daily News.

Tang never had any contact with appellant's attorney. He provided no input for any of the company statements in the ETA form 9089. Tang never saw or signed the completed ETA form 9089. No copy of the ETA form 9089 was kept in appellant's personnel file at Achem. Only after the commencement of this litigation did Achem's director of human resources

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employment eligibility." (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 435; see 8 U.S.C. § 1324a(b)(1)(B)(ii).) "Obtaining a green card is typically a lengthy process. . . . An employer sponsoring an employee for a green card must satisfy the government that there are no United States citizens who could perform the job equally well. To carry out this requirement, a sponsoring employer must submit a series of documents, including a description of the job, minimum job requirements, evidence that the sponsored employee meets those requirements, and a prevailing-wage determination from the Department of Labor (DOL), the latter being an approximation of how much the worker would be paid according to prevailing wage rates. The employer must then solicit applications from United States citizens and interview every applicant who appears to be qualified. Once these steps are complete, the employer must attest to the DOL . . . that no United States applicant was qualified for the job." (*Gason v. Dow Corning Corporation* (6th Cir. 2017) 674 Fed.Appx. 551, 555.)

obtain the pin number and password for Achem's account on the government website, where she downloaded a copy of the ETA form 9089.

The United States government issued appellant a green card in August 2008. Achem gave her a raise in September 2008, but her new wage was less than $32 per hour. There was no evidence that appellant or anyone else ever served as a computer and information system manager for Achem.

Tang left the company in early 2009 to form his own, competing business. Appellant asked to join him, but Tang said no. According to Tang, appellant had never complained about not being paid overtime before he left Achem.

Appellant pursued a worker's compensation claim against respondent in late 2010, contending she suffered a psychiatric injury between February and November 2010, as a result of her employment with Achem. She also initiated an overtime complaint with the Labor Commission. Appellant was dissatisfied with her January 2011 performance review, felt she had been demoted from computer programmer to data entry clerk, and went on an extended unpaid leave of absence beginning January 28, 2011.

In July 2011, while appellant was still on her leave of absence, Achem's chief operating officer communicated with Tang concerning appellant's pending Labor Commission complaint. Thinking he might be able to help the situation between appellant and Achem and because he did not want his relationship with Achem "to become worse," Tang offered to speak with appellant. During a telephone conversation with her, Tang learned for the first time that Appellant insisted he promised Achem would pay her the salary equivalent of $32 per hour once she obtained a green card.

Appellant did not return to Achem. She initiated this lawsuit on August 31, 2011. The original complaint remained the operative pleading. Appellant alleged intentional misrepresentation, intentional infliction of emotional distress, breach of contract, retaliation, and a number of Labor Code violations. Appellant contended she was promised an hourly rate of $31.89, but was paid only $20.71 per hour. She was denied meal and rest breaks and not paid overtime.

The matter was tried to a jury over a three-week period. The jurors answered questions on seven of nine special verdict forms and rendered a

verdict in respondent's favor. Postverdict polling revealed the jurors were unanimous in their responses to all the questions they answered. The jury's findings were as follows: Appellant was employed by respondent. Respondent never falsely represented that it would pay appellant $32 per hour and never subjected her to adverse employment actions or outrageous conduct that would support claims of retaliation or intentional infliction of emotional distress. Appellant met all the criteria for the administrative exemption, i.e., her "duties and responsibilities involve[d] the performance of office or non-manual work directly related to management policies or general business operations of [respondent or its] customers"; she "customarily and regularly exercise[d] discretion and independent judgment;" she "perform[ed], under general supervision only, specialized or technical work that require[d] special training, experience or knowledge;" and she "perform[ed] exempt duties more than half of the time." With these findings, the jury did not address appellant's claims for overtime compensation or rest break violations.

Postjudgment, the trial court denied appellant's motions for judgment notwithstanding the verdict and for a new trial. In addition to prevailing party costs, respondent was awarded expert witness fees based on appellant's rejection of respondent's section 998 settlement offer. Appellant appealed.

This lawsuit is no stranger to our court.[3] One appeal, taken from a nonappealable order, already has been dismissed (case no. B280724). Five writ petitions were summarily denied (case nos. B263444, B267576, B268985, B269372, B269775), as was appellant's petition to transfer review of her posttrial misdemeanor contempt conviction from the appellate division of the superior court to this court (case no. B282945). At appellant's request, we consolidated five of her appeals for briefing, oral argument and decision.

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[3] The parties are familiar litigants as well. Before the 2014 trial in this lawsuit, appellant filed a second action against respondent for fraud, breach of contract, wrongful termination, and violations of both the California Fair Employment and Housing Act and Labor Code (L.A. Super. Ct. no. BC556293). This court reversed the denial of respondents' motion for summary adjudication of issues. (*Ouyang v. Achem Industry America, Inc.* (Aug. 16, 2017, B282801) [nonpub. opn.].) Judgment was eventually entered in respondent's favor. Two appeals arising from this action have been dismissed, and one remains pending (case no. B290915).

Those consolidated appeals and this appeal were argued together. Our decision in the consolidated appeals is also filed today (*Ouyang v. Achem Industry America, Inc.* (June, 28, 2019, B267217) [nonpub. opn.]).

## DISCUSSION

### I. Rules of Appellate Procedure

We never presume error by the trial court. Appellant has the burden to establish that the trial court erred and then demonstrate prejudice as the result of the error. (*Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 512 (*Shenouda*).) We reverse a judgment only to prevent a miscarriage of justice. (Cal. Const., art. VI, § 13.) The failure to discuss an issue in the opening brief results in its forfeiture. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 (*Christoff*).)

"In every appeal, 'the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment.'" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739 (*Myers*).) This duty "'grows with the complexity of the record.'" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658 (*Boeken*).) Adherence to this rule of appellate advocacy is particularly important when the appellant challenges the sufficiency of the evidence. The appellant who fails to summarize all the material evidence, and instead cites only the evidence that favors her position, will forfeit appellate review of her claims. (*Shenouda, supra,* 27 Cal.App.5th at p. 514.)

Where "the evidence is in conflict, the appellate court will not disturb the findings of the trial court. The [reviewing] court must consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment." (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.)

In addition to providing a fair summary of the evidence, appellant also has the "duty to point out portions of the record that support [her] position . . . . The appellate court is not required to search the record on its own seeking error. . . . [A]ny point raised that lacks citation may, in this court's discretion, be deemed waived." (*Del Real v. City of Riverside* (2002) 95

Cal.App.4th 761, 768 (*Del Real*).) Factual assertions must be supported by accurate citations to the appellate record, including volume and page number. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Unsupported fact contentions may be disregarded. (*Rybolt v. Riley* (2018) 20 Cal.App.5th 864, 868.)

Appellant also must present cogent legal arguments and citations to relevant authorities. "[C]iting cases without any discussion of their application to the present case results in forfeiture. [Citations.] We are not required to examine undeveloped claims or to supply arguments for the litigants" (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*)), nor do we "construct theories or arguments that would undermine the judgment and defeat the presumption of correctness" (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 600 (*Okorie*)). A reviewing court does not serve as "backup appellate counsel." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 (*Mansell*).)

Appellant's status as a self-represented litigant does not permit her to ignore appellate procedural rules. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) The same standards apply whether a litigant is in propria persona or is represented by counsel. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) As the Supreme Court has held, to do otherwise, and treat an appellant more leniently because she is representing herself, "would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985.)

## II. Appellant Forfeited a Number of Claims by Not Complying with Basic Rules of Appellate Procedure

Appellant does not provide this court with a balanced summary of the evidence "'in the light most favorable to the judgment.'" (*Myers, supra,* 178 Cal.App.4th at p. 739.) Instead, she uses the "statement of facts" portion of her opening brief to introduce contentions and arguments.[4] Appellant

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[4] In a typical example, appellant states in her facts, "It is undisputed that [respondent's human resources department], not [appellant] handled recruitment in [appellant's] permanent labor application and the contact person on the advertisements is [respondent's] HR." She cites portions of her

provides many citations to the record, but a disquieting number are incorrect[5] or inaccurately describe the trial evidence.[6]

Although appellant's briefs include citations to case authorities and a description of the holdings, little effort is made to explain how the cited

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testimony that support this statement, but ignores her own conflicting testimony. She does not acknowledge contradictory testimony by Tang and respondent's human resources director.

[5] Appellant states respondent permitted her to "perform the job duties of computer programming and magnament [*sic*] of computer information system [*sic*]." She identified one exhibit and nine reporter's transcript citations as support for this assertion. None of the references supports the statement. The evidence established that appellant ran computer reports and was involved with purchasing, logistics, and accounting. As "Lin Ouyang M.I.S. Consulting Service," appellant accepted a $120 consulting fee from Achem's outside auditor in September 2010.

[6] Appellant's facts include the statement that supervisor Sue Ting "admitted that she yelled at [appellant]." The reporter's transcript citation for this statement reveals the opposite. Although defense counsel's question was inartfully phrased ("You – didn't yell at [appellant] at all, to say nothing of constantly; correct?"), the "no" answer clearly signaled Ting's denial that she ever yelled at appellant.

Appellant also states, "Tang agreed to use attorney Taihe Wang to file the [employer's] petition." Again, appellant cites her own testimony and ignores Tang's contrary testimony that before this lawsuit was filed, he had never heard of the attorney, did not hire him, and did not sign a retainer agreement with the lawyer on respondent's behalf.

Appellant states as fact that Richard Du, Achem's deputy general manager in 2011, "intentionally collected negative comments on [her] performance." Appellant provides a number of record citations for this statement, but most do not involve Du's testimony, and not one supports her statement. Du never used the word "negative." He testified he gave appellant "a fair and what I believed to be a reasonable performance evaluation." When appellant asked, "So you intentionally gather information from others for my performance review?," Du answered, "Quite a few of our employees have provided information to me."

authorities apply to the issues on appeal.[7] (*Allen, supra,* 234 Cal.App.4th at p. 52.) Appellant presents statements of law seriatim, instead of weaving them into apt, understandable legal arguments. Although appellant's arguments are generally undeveloped and difficult to follow, we are required to evaluate them as presented. We cannot, for example, speculate as to their analytical conclusions or presume they support overturning the jury's verdict. (*Mansell, supra,* 30 Cal.App.4th at p. 546; *Okorie, supra,* 14 Cal.App.5th at p. 600.) For these reasons, appellant has forfeited the following claims:

### *A. Sufficiency of the Evidence to Support the Administrative Exemption Finding*

Respondent asserted, and the jury agreed, that appellant was administratively exempt from overtime and the requirement to provide rest breaks. Appellant's position throughout this litigation has been that even though she was employed by respondent as a computer professional, she was still entitled to overtime compensation and wages for missed rest breaks. Appellant challenges the sufficiency of the evidence to support the jury's contrary finding.

#### 1. Governing Principles

Unless an exemption applies, California employees must be paid at an overtime rate when they work more than eight hours in one workday or more

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[7] For example, appellant asserts, "Since this case involves a federal statute, this court must apply and interpret federal law. Decisions of the United States Supreme Court are binding. Lower court decisions, including those of the Ninth Circuit Court of Appeal[s], are not. If federal precedent is either lacking or in conflict, the court will independently determine federal law. (*Levy v Skywalker Sound* (2003) 108 Cal.App.4th 753, 763, fn. 9.)"

This is a stand-alone argument in the section of the opening brief where appellant contests the trial court's order granting one of respondent's motions in limine. This ruling precluded appellant from presenting evidence or argument that the sponsor's petition constituted a contract between Achem and the United States government and she was a third party beneficiary entitled to enforce the salary terms of $32 per hour. Nowhere in this argument, however, does appellant identify a federal statute or explain how this legal precept pertains to any of her contentions.

than 40 hours in one workweek (Lab. Code, § 510), and they are entitled to rest periods for every four hours worked (Lab. Code, § 226.7). Exemptions from the overtime and rest period requirements are set forth in Industrial Welfare Commission (IWC) wage orders, some of which expressly incorporate parallel federal regulations. (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1253-1255 (*Combs*).) This case involves IWC Wage Order No. 4–2001. (Cal. Code Regs., tit. 8, § 11040.)

IWC Wage Order No. 4–2001 applies to "professional, technical, clerical, mechanical, and similar occupations." (Cal. Code Regs., tit. 8, § 11040, subd. (1).) Under this wage order, an employer is not required to pay overtime or provide rest breaks for, inter alia, "administratively exempt" employees. Criteria for the administrative exemption are as follows: An employee must devote more than 50 percent of his/her work time to administrative duties and responsibilities and earn at least twice the minimum wage. (Cal. Code Regs. tit. 8, § 11040, subd. (1)(A)(2)(f), (g).) The duties must involve "[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers; . . . [¶] . . . [¶] [in which the employee] customarily and regularly exercises discretion and independent judgment; and [¶] . . . [¶] . . . performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or [¶] . . . executes under only general supervision special assignments and tasks." (*Id.* at § 11040, subd. (1)(A)(2)(a)-(e).) Federal regulations incorporated into IWC Wage Order No. 4–2001 explain the phrase "directly related to management or general business operations" "includes, but is not limited to, work in functional areas such as . . . finance; accounting; budgeting; auditing; . . . ; purchasing; procurement; advertising; marketing; . . . ; computer network, internet and database administration . . . ." (29 C.F.R. § 541.201(b); *Combs, supra,* 159 Cal.App.4th at p. 1256.)

An employer sued for overtime and rest break violations must raise the wage order exemption as an affirmative defense and has the burden to prove the employee qualifies for exempt treatment. "Under California law,

exemptions from mandatory overtime provisions are narrowly construed." (*Combs, supra,* 159 Cal.App.4th at p. 1254.)

2. Analysis

As appellate courts universally recognize, our "'power . . . begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact].'" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845-846.) """[C]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."'" (*Id.* at pp. 866-867.)

The substantial evidence test makes it imperative that reviewing courts have a complete and balanced summary of the pertinent evidence. (*Shenouda, supra,* 27 Cal.App.5th at p. 514.) This is particularly so with a record as voluminous as this one. (*Boeken, supra,* 127 Cal.App.4th at p. 1658.) Because appellant fails to summarize all the material evidence, and instead cites only the evidence that favors her position, she has forfeited appellate review of the administrative exemption finding.[8] (*Shenouda* at p. 514; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Even without forfeiture, appellant's arguments would fail. Much of the evidence that established the administrative exemption finding came from appellant's own testimony. Appellant testified her job was "important" to respondent's operations and required specialized training. Her primary job duties were "number one, designing, developing, and maintaining computer

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[8] Rather than summarize the relevant evidence concerning the administrative exemption, appellant focuses on respondent's requirements that she work set hours and fill out time sheets. She asserts, without citation to any authority, that an employer's insistence on punctuality by its employees is incompatible with a finding that the employees perform their job duties under general supervision only.

programs; number two, data analysis and reporting; number three, management responsibilities, which she clarified as "management of computer information systems." Appellant agreed these duties occupied most of her workday. She was paid a salary, exercised her own judgment when performing her duties, and worked independently, without direct supervision. She worked with computer programs in the purchasing department. On occasion, and on her own initiative, she reviewed and revised coworkers' sales reports. She worked in functional areas, e.g., auditing, accounting, and purchasing. Respondent's witnesses tended to downplay appellant's contributions to the company, but even the more modest job duties fell within federal parameters of work that is "directly related to the management or general business operations." (29 C.F.R. § 541.201(b) [e.g., accounting, purchasing, procurement, computer network, internet and database administration].)

### *B. Breach of Contract Based on ETA Form 9089 and Third Party Beneficiary Theory*

Plaintiff's complaint asserted both fraud and contract theories to support the claim that she was entitled to be paid $31.89 per hour after she obtained her green card. On the contract theory, she alleged only that she "entered into contracts and/or agreements" with respondent to be paid that sum. The pleading did not specify whether the agreements were oral or written. On the fraud theory, she alleged reasonable reliance on respondent's knowingly false promise to pay that hourly rate and suffered humiliation and mental anguish in addition to not receiving the promised wages.

Shortly before trial, appellant sought leave to file a first amended complaint, in which she proposed to drop her original breach of contract theory and allege instead that she was a third party beneficiary of a written agreement (the ETA form 9089) between Achem and the United States government to pay her $32 per hour (not the $31.89 she alleged in the original complaint) after she obtained a green card. She proposed to revamp the fraud cause of action with allegations that she passed on an opportunity for higher paying employment with another company in reliance on respondent's false salary promise of $32 per hour. Leave to amend was

denied. Although the hearing on the motion was reported, the appellate record does not include a reporter's transcript.

The following month, the trial court granted respondent's motion in limine and precluded appellant from introducing the ETA form 9089 as evidence of a written contract between respondent and the government, to which appellant was a third party beneficiary who would earn $32 per hour.[9] In other words, the trial court prevented appellant from presenting evidence in support of a legal theory she was not entitled to pursue. Appellant seeks to challenge this ruling.

In this court, however, appellant fails to provide an adequate record for review. Again, she does not discuss the substantial evidence, including exhibits, that demonstrated Achem played no role in the completion and submission of the ETA form 9089. She ignores Tang's testimony that he never reviewed or signed that document.

Appellant's legal arguments are truncated and misleading. As we observed in footnote 7, *ante*, she argues "this court must apply and interpret federal law;" but she does not identify any federal statute, regulation or appellate decision. Her primary reliance instead is on a decision from a New York state court applying New York law (*Kausal v. Educational Prods. Info. Exch. Inst.* (N.Y.App.Div. 2013) 105 A.D.3d 909).

Significantly, appellant's legal arguments overlook that the goal of the ETA form 9089–assisting a resident alien to obtain a green card–was achieved. A green card establishes a resident alien's right to work in this country, not to hold a particular job. Representations on the ETA form 9089 of an offer for a job that a foreign applicant is qualified to perform do not constitute a promise of that specific job or salary. (*Rao v. Covansys Corp.* (N.D. Ill., Nov. 1, 2007) No. 06 C 5451, 2007 U.S.Dist. LEXIS 80937 [employer's representations in H-1B visa application that employee would perform specified job duties "did not give rise to any contract for [employee's] benefit that could later be breached if his employer did not employ him as stated in the application"].)

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[9] The ETA form 9089 was received into evidence and was the subject of much testimony, primarily concerning whether Tang, on behalf of Achem, ever promised to pay appellant a salary calculated at $32 per hour.

Additionally, no evidence suggested appellant's employment relationship with respondent was anything but at-will. The parties did not sign an agreement requiring them to maintain an employer/employee relationship for a specified period or at a specified salary after she obtained a green card. As appellant testified, she was free to leave Achem's employ any time. Similarly, respondent was free to operate its business as it saw fit. In this regard, the evidence was undisputed that respondent never had a "computer department" and never created the position of "computer and information system manager."

In sum, appellant's cause of action for breach of a written contract is not supported by appropriate citations to the record or an "adequate legal discussion or citation to authority." (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1399 (*Roberts*).) Appellant has forfeited this issue.

### *C. Breach of Written Contract Based on Agency Theory*

Appellant contends the judgment must be reversed because "un conflicted [*sic*] evidence presented at trial compels a judicial conclusion that attorney Taihe Wang was an agent, or subagent of Achem to represent Achem in applying [for appellant's] green card." Appellant concedes she is raising this issue for the first time on appeal. Although she acknowledges the existence of an agency relationship typically presents a question of fact, she asserts the facts are undisputed and urges this court to exercise our discretion to consider the issue. We decline to do so.

Substantial conflicting evidence aside, this contention falls under the general rule that issues which could have been, but were not, raised in the trial court are forfeited. (*Roberts, supra,* 217 Cal.App.4th at p. 1399.) It is fundamentally unfair to respondent and the trial court to consider this new challenge for the first time on appeal.

### *D. Fraudulent Misrepresentation*

The jury found respondent did not falsely represent that it would pay appellant $32 per hour after she obtained a green card. Although appellant indicated in her opening brief that she was challenging this finding, she

presented no legal argument on the issue. The claim is forfeited. (*Christoff, supra,* 134 Cal.App.4th at p. 125.)

### *E. Instructional Error*

Appellant contends jury instructions relating to the retaliation causes of action (CACI Nos. 2505, 2507, 2509, and 2512) included incorrect statements of the law, compelling reversal of the judgment in respondent's favor.[10] Appellant forfeited claims concerning these instructions.

Appellant requested that CACI Nos. 2505, 2507, and 2509 be given. "It is an elementary principle of appellate law that '[a] party may not complain of the giving of instructions which he has requested." (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1090.)

Although appellant did not include CACI No. 2512 in her list of proposed instructions, she expressly agreed with the trial court's decision to read it to the jury. After the trial court read all the jury instructions, including CACI No. 2512, it engaged in a sidebar discussion with appellant and defense counsel. Defense counsel stated that CACI Nos. 2507 and 2512, as just read to the jury, "no longer conform[ed] to the evidence." He proposed minor changes, and appellant responded, "I'm OK with that one." Appellant wanted to talk more about the administrative exemption jury instruction, CACI No. 2721. The trial court refocused the parties' attention on CACI Nos. 2507 and 2512; and appellant reiterated, "I am okay with that."

### *F. Attorney Misconduct*

By her count, appellant documented 53 instances of misconduct by respondent's trial attorneys. Most of the allegations concern statements made in the jurors' presence. They were not preserved, however, as appellant failed to object. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794 (*Cassim*) ["'to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial'"].)

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[10] We discuss appellant's challenge to CACI No. 2721, concerning the administrative exemption affirmative defense, and her proposed special instructions in part II, *post*.

Appellant forfeited others by failing to provide appropriate record citations and legal argument.[11]

1. Questioned Documents Testimony and Expert

In a sparse claim under the heading "overtime/daylight savings time issue," appellant asserts respondent failed to produce certain documents in discovery and accused her of suppressing documents and failing to call an expert witness she "had no obligation to call." She asserts a boilerplate claim of prejudice and adds, "Achem was not prejudiced as it produced an expert witness at trial."

Only when we examine appellant's record citations does it become apparent that she contends certain documents produced by respondent in discovery, including appellant's time sheets, were forged. Appellant retained a handwriting expert, but that expert did not testify. Respondent's handwriting expert testified appellant's time sheets were not forged.

Appellant's failure to object during trial to opposing counsel's statements on this issue resulted in forfeiture. In any case, appellant's bare assertion of prejudice is belied by the record. As an administratively exempt employee, appellant was not entitled to overtime compensation and could not have been prejudiced by the time sheet evidence.

2. Comments Concerning Dr. Chu

Dr. Chu was appellant's treating physician and authorized a two-week absence from work so she could undergo medical tests. Respondent expected Dr. Chu to testify, but his schedule conflicted with the trial dates. Appellant, in her own words, "failed to arrange" for Dr. Chu to testify. Portions of the physician's deposition were read to the jury.

Appellant contends respondent's trial counsel unfairly argued that she "had an opportunity to present her GI doctor at trial (11 RT 20-26), which is not supported by the evidence at trial, insinuating [appellant] suppressed evidence." We cannot evaluate this claim of error. Appellant advised the offending statements were made at "11 RT 20-26," but no such citation exists in the appellate record. We do not "scour the record" to find reversible error.

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[11] We address the solitary contention that was preserved in part III, *post*.

(*Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 527, fn. 3.)

3. Comments Concerning Dr. Greenberg

Appellant asserts respondent's trial counsel engaged in prejudicial misconduct when "he disclosed without a court order in the opening statement the content of [the] Greenberg report, which he knew was privileged and inadmissible." Dr. Greenberg is a psychiatrist who administered tests to appellant as part of an earlier worker's compensation proceeding. He found no basis for appellant's claim that she sustained a psychiatric injury while in respondent's employ. After an Evidence Code section 402 hearing outside the jurors' presence, Dr. Greenberg testified at trial without objection. The conclusions in his report were shown to the jury, also without objection.

Appellant's claim of misconduct during opening statement lacks merit, as respondent's trial counsel did not misstate the evidence that was eventually admitted without objection. To the extent appellant is claiming the trial court prejudicially erred in permitting this evidence, she forfeited that issue by failing to object in the trial court and failing to brief the issue here. (Cal Rules of Court, rule 8.204(a)(2)(B), (C).)

4. Misrepresenting Facts to the Trial Court

Appellant sought general and punitive damages. The trial court granted respondent's motion in limine to exclude evidence of its financial condition until there "is a ruling or prima facie case of malice, oppression, or fraud." It denied respondent's motion to exclude evidence of appellant's suspicions of illegal activity based on discrepancies in computer reports (see Discussion, part 2.B., *post,* concerning appellant's refused special instruction concerning retaliation). Evidence pertinent to the latter claim included witness testimony, but no exhibits. In discussions outside the jurors' presence, however, appellant argued certain exhibits were relevant to both the calculation error and respondent's financial condition.[12]

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[12] Early in the trial, appellant advised the trial court and respondent that an Achem "income statement is related to my complaint that I was retaliated

On appeal, appellant complains the trial court erroneously excluded exhibit 99, a 450-page inventory aging report she asserts was relevant to her retaliation causes of action. She argues the trial court was misled by respondent's counsel and incorrectly sustained the defense objection that the document pertained to the company's financial condition and should be excluded pursuant to the in limine ruling.

What appellant has described is a claim of evidentiary error, not misconduct. Evidentiary issues were not preserved for appeal.[13]

To the extent the claim may be cast as attorney misconduct, appellant fails to provide any citations to support an inference that respondent's counsel intended to mislead the trial court or acted in bad faith when he objected to exhibit 99. (*Del Real, supra,* 95 Cal.App.4th at p. 768.) Additionally, appellant cites *Estate of Young* (2008) 160 Cal.App.4th 62, 89, to argue, "The order of bifurcation does not prohibit the introduction of prima facie evidence to establish the underlying case for punitive damages." The argument and citation obscure appellant's position, but raise the inference appellant sought introduction of the exhibit in order to demonstrate respondent's financial condition and net worth. Without cogent analysis and authority, appellant has forfeited the claim. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 399.)

5. Personal Attacks

Appellant asserts respondent's trial counsel disparaged her character and motives for pursuing this litigation during opening statement and closing argument. (*Bigler-Engler, supra,* 7 Cal.App.5th at p. 295.) To preserve a claim of attorney misconduct committed in front of the jury, appellant was required to object at the time the statements were made. (*People v. Friend* (2009) 47 Cal.4th 1, 32 (*Friend*).)

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[against] because I disclosed Achem . . . materially misrepresented financial statements." Late in the proceedings, appellant argued a particular income statement "proves the motive of Achem's discrepancy, concealed discrepancy, is very likely to - - change [its] financial position."

[13] Appellant's one-sentence argument that the trial court erroneously excluded four additional exhibits (96, 98, 225, and 226) is similarly forfeited.

Appellant's briefs do not reiterate each of the offending statements, but do include record citations by volume and page number for them. We reviewed the citations, and in none of them did appellant lodge an objection. Her failure to do so results in forfeiture. (*Friend*, *supra*, 47 Cal.4th at p. 32.)

### *G. Postjudgment Order for Expert Witness Fees*

Appellant's second notice of appeal under this case number indicated she contested the trial court's decision to award respondent $26,058.30 in expert witness fees pursuant to section 998. Appellant's "statement of the case" portion of her opening brief mentions the motion to reconsider the award of expert witnesses fees, but otherwise ignores the issue. It is forfeited. (*Christoff, supra,* 134 Cal.App.4th at p. 125.)

## II. Jury Instructions

### *A. CACI No. 2721 – Administrative Exemption*

CACI No. 2721 sets forth the criteria for application of the administrative exemption, as requested by respondent. The version given to the jury was modified by deleting the fifth requirement, i.e., the employee's monthly salary must be at least twice the state minimum wage.

In the trial court, appellant objected to this instruction on the basis respondent did not prove that she exercised discretion or independent judgment in any matters of significance to respondent's operations. Appellant did not suggest changes to the standard CACI language or propose any clarifying or supplemental instructions.

On appeal, appellant argues CACI No. 2721 is erroneous as a matter of law because it does not advise jurors that an employee's exercise of discretion or independent judgment must involve a matter of significance to an employer's operations and fails to provide specific examples for the jury to consider in order to conclude that this element has been satisfied. Appellant also complains of the omission of the salary factor.

As this court has observed, a CACI instruction is not presumed to be correct. (*Bowman v. Wyatt* (2010 186 Cal.App.4th 286, 298, fn 6 (*Bowman*).)[14]

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[14] In *Bowman*, we held a former version of CACI No. 3704, concerning whether a plaintiff is an employee or independent contractor, was erroneous

An assertion that a CACI instruction is legally incorrect may be raised for the first time on appeal. (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9 (*Suman*).) Our review is de novo. (*Bowman,* at p. 298.)

In this case, the omission of the salary factor was harmless error. At all relevant times, appellant indisputably earned more than twice California's minimum wage. As there were no questions concerning appellant's salary, it was not a factor the jurors needed to consider in evaluating whether she was administratively exempt.

Appellant's companion contention–that CACI No. 2721 misstates the law because it does not advise jurors that an employee's exercise of discretion or independent judgment must involve a matter of significance to an employer's operations or provide specific examples for the jury to consider–also fails. Having independently reviewed CACI No. 2721, we conclude it correctly advises jurors of all the factors they must consider to determine whether an employee is administratively exempt from overtime pay requirements, including the requirement that an employee "customarily and regularly exercises discretion and independent judgment."

Our de novo review does not extend to a consideration of appellant's argument that CACI No. 2721 would benefit from additional language or examples. Appellant did not raise this contention in the trial court, and it is forfeited. (*Suman, supra,* 23 Cal.App.4th at p. 9 ["When a trial court gives a jury instruction which is correct as far as it goes but which is too general or is incomplete for the state of the evidence, a failure to request an additional or a qualifying instruction will waive a party's right to later complain on appeal about the instruction which was given"].)

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because it told the jury the defendant's right to control the plaintiff's work "*by itself,* gave rise to an employer-employee relationship" and to consider the listed secondary factors only if the jurors decided the defendant did not have the right of control. (*Bowman, supra,* 186 Cal.App.4th at p. 799.) The law is to the contrary, however, and jurors are required to consider the secondary factors even if the defendant had the right to control the plaintiff's work. (*Ibid.*)

### *B. Refusal to Give Appellant's Proffered Special Jury Instructions*

The trial court declined to give appellant's two requested special instructions. Appellant must demonstrate not only that the trial court's rulings were erroneous, but also that she was prejudiced by them. (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1485-1486.)

#### 1. Retaliation

The first refused instruction concerned appellant's retaliation claims. Appellant asked for the following instruction: "The plaintiff need not prove she complained about an actual violation of the law; rather, plaintiff must show [she] reported to the employer in good faith her reasonably based suspicion of unlawful activity. [¶] (*Green v. Ralee Eng. Co.* (1998) 19 Cal.4th 66, 78 . . . .)" Respondent opposed the request, arguing, "[t]here is no evidence that [appellant] reported any reasonably based suspicion of unlawful activity or any unlawful activity to anyone. There was no report of unlawful activity. There was a statement that there was a discrepancy [in the computer-generated inventory aging reports]." The trial court agreed with respondent's assessment, observing, "[t]here was not any testimony with regard to unlawful activity, only that there was a problem."

Appellant's concedes this point, and the concession is fatal to her argument. She acknowledges testimony by Du, respondent's deputy general manager at the time, who explained the discrepancy was the result of an internal problem "with the posting in the inventory." She also provides a citation to Ting's testimony (erroneously attributing it to Du). Ting, the former head of accounting for Achem, testified the discrepancy was the result of an easily corrected human error that occurred when staff accessed the computerized inventory system. Appellant did not ask any witness to testify concerning illegal activities, nor did she proffer any exhibits that would support such a finding.

Also, appellant makes no attempt in this court to justify the legal soundness of the proffered instruction. Appellant relies solely on *Green v. Ralee Engineering Co., supra,* 19 Cal.4th 66, but that opinion does not

support any language in the rejected special jury instruction. *Green* merely reaffirms the Supreme Court's holding in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1257, that "'[t]he tort of wrongful discharge is not a vehicle for enforcement of an employer's internal policies." (*Green,* at p. 78.) As in *Green,* appellant's "'failure to identify a statutory or constitutional policy that would be thwarted . . . dooms [her] cause of action.'" (*Ibid.*)

2. Rest Breaks

Without a CACI instruction on the subject of rest breaks, both sides presented the trial court with proposed special instructions. The trial court gave respondent's version.

Appellant contends respondent's special jury instruction was erroneous because she was never provided with a written Achem rest break policy and "there was no fixed time for [her] and the co-workers in her team to take rest breaks. But employers are not required to have written rest break policies. (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1002.) Nor is it necessary that employees have assigned times for their rest breaks.

In any case, appellant cannot demonstrate prejudice. Once the jury found appellant was administratively exempt, the rest break provisions set forth in section 12 of Wage Order 4−2001 no longer applied to her. (Cal. Code. Regs., tit. 8, § 11040, subd. (1)(A).)

## III. Attorney Misconduct

Appellant preserved for appeal one complaint of alleged attorney misconduct. She contends respondent's trial counsel engaged in prejudicial misconduct concerning her job duties ("Achem attorney deceived [appellant] by a false promise that Achem did not dispute her job duties . . . , and only notified her otherwise upon commence[ment] of trial"). The argument reflects appellant's misunderstanding of the law that places the burden on respondent to prove her job duties fell within the administrative exemption of IWC Wage Order 4−2001.

Pretrial, appellant sought a stipulation that she performed the duties of a computer professional. Respondent was of the view that the proposed stipulation overstated appellant's job duties and did not sign it. Also, the

proposed stipulation did not address the administrative exemption in IWC Wage Order No. 4–2001. Respondent had the burden to prove appellant met the criteria for an administrative exemption. This required proof of her job duties. There was no attorney misconduct on this score.

## DISPOSITION

The judgment and postjudgment order are affirmed. Respondent is awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

DUNNING, J.*

We concur:

MANELLA, P. J.

COLLINS, J.

*Retired Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.